No. 82-2146

Office · Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1982

MASHPEE TRIBE,

Petitioner,

vs.

NEW SEABURY CORP., ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Did the First Circuit deny judicial due process by summarily ordering its Clerk, without reasoned opinion, to return without filing Indian petitioner's motion that the court exercise its inherent corrective power to vacate its 1979 judgment and enter substitute judgment *nunc pro tunc*, said motion presented on three documented *prima facie* grounds:

1. During the 1979 proceeding, petitioner's then chief counsel had not brought either to the District or Circuit Court's attention that petitioner had been a matter of law, non-terminated, politically recognized federal tribe at least since 1789, such political recognition bound the court, and petitioner's continuous federal wardship and federal standing to sue as a special juristic person was a required consequence;

2. Accordingly, the Circuit Court's affirmance of a judgment of dismissal by the District Court based on a negative jury finding on the legal question of petitioner's tribal existence and consequent lack of "standing to sue", was void as a matter of law;

3. Any doubt about correcting this procedural aberration, should be resolved in favor of petitioner as a federally protected political community and ward of this Court?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations ii

Order Below 1

Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 3

Reasons for Granting the Writ 4

Summary 9

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

American Iron and Steel Institute v. EPA, 560 F. 2d 589 (3rd Cir. 1977), cert. denied, 435 U.S. 914 (1978) 9

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 8

Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956) 8

Contents

Page

Epps v. Andrus, 611 F. 2d 915 (1st Cir. 1979) 9

Greater Boston Television Corp. v. FCC, 463 F. 2d 268 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972)..... 9

Mashpee Tribe v. New Seabury Corp., 592 F. 2d 575 (1st Cir. 1979), cert. denied, 444 U.S. 866 (1980)..1, 2, 3, 4, 7, 10

Oetjen v. Central Leather Co., 246 U.S. 297 (1918) 6

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974)..... 9

Sargeant v. Sharp, 579 F. 2d 645 (1st Cir. 1978) 8

Tully v. United States, 32 Ct. Cl. 1 (1896) 6

United States v. Holliday, 70 U.S. (3 Wall) 407 (1866) 6

Statutes Cited:

28 U.S.C. §1254(1)..... 2

28 U.S.C. §2106 2

United States Constitution Cited:

Fifth Amendment 2

Rule Cited:

Supreme Court Rule 17(a) 2

Contents

Page

Other Authority Cited:

Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17 (1979) 6

APPENDIX

Appendix A—Order of Court of Appeals 1a

Appendix B—Plaintiff-Appellant's Motion to Vacate Judgment and to Enter Substitute Judgment Nunc Pro Tunc 3a*

Attachment "A" (Morse Report) 3a*

Attachment "B" (McKenny Report) 3a*

Attachment "C" (Congressional Report) 3a*

Attachment "D" (Schoolcraft Report) 3a*

Attachment "E" (Federal Answer) 3a*

Atachment "G" (Plaintiff's Memorandum of Law 3a*

*** Printing of these documents are omitted here but will be submitted to the Court upon filing.**

Contents

Page

Appendix C—Proffered Attachment "F" (Earle Report) 4a*

Appendix D—List of Parties 5a

No.

In The

Supreme Court of the United States

October Term, 1982

MASHPEE TRIBE,

Petitioner,

vs.

NEW SEABURY CORP., *et al.*,*

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Mashpee Tribe prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the First Circuit entered in this case on February 1, 1983.

ORDER BELOW

The order of the United States Court of Appeals for the First Circuit is docketed as Nos. 78-1272, 1273 and 274, *Mashpee Tribe*

* *See* List of Parties, Appendix D, 5a.

v. New Seabury Corp. et al., and is printed as Appendix A to this petition (1a).

JURISDICTION

The order of the United States Court of Appeals for the First Circuit was entered on February 1, 1983. By order dated May 23, 1983, Mr. Justice Brennan extended the time for filing this petition to and including July 1, 1983. This petition was filed within the extended time. This Court has jurisdiction under 28 U.S.C. §§1254(1) and 2106, and under Rule 17(a), U.S.S.C.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall. . . be deprived of life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

The proceeding which prompted this petition was petitioner's motion with written requested hearing, that invoking its inherent corrective power, the First Circuit vacate its 1979 judgment, *Mashpee Tribe v. New Seabury Corp.*, 592 F. 2d 575 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1980) (*Mashpee I*), and enter a substitute judgment *nunc pro tunc* on fully documented *prima facie* grounds that said judgment was void as a matter of law (*see* Plaintiff-Appellant's Motion to Vacate Judgment and to Enter Substitute Judgment Nunc Pro Tunc which is included in papers to be handed up to the Court upon filing this petition).

This petition seeks review of the Circuit Court's order that the papers be returned without filing (2a).

The gist of petitioner's motion to the Circuit Court was that its original chief counsel, who had agreed petitioner's tribal standing to bring its 1976 Indian land complaint alleging Non-intercourse Act violation be submitted to a jury, had not brought either to the trial court's or the Circuit Court's attention, that petitioner "had been politically recognized" — "has never been federally terminated" — "uses and occupies a land reserve officially recognized and designated as to location and acreage" — that "under the political question doctrine the District Court was without power to look behind plaintiff's non-terminated federal recognition". Accordingly, petitioner believes the District Court's 1978 judgment "that this action be dismissed on the merits, the plaintiff not having established its standing to bring suit as an Indian tribe" is void as a matter of law and the Circuit Court's 1979 affirmance of such void judgment not only did not validate it but is itself void (*see* Appendix B—Plaintiff-Appellant's Motion).

Attached to petitioner's motion were photocopies of pertinent United States executive and legislative departmental records over

a period of years inventorying and listing petitioner as an Indian tribe of the United States living on its reservation (*see* Attachments "A", "B", "C", "D" and "F" which are included in papers to be handed up to the Court upon filing this petition). Also attached was a current (1982) admission by the United States Justice Department "that the United States has never terminated the Mashpee Tribe, their community or their Reservation. . . . * (Attachment "E").

In addition, petitioner incorporated a memorandum of law supporting the court's inherent power to grant relief in cases of manifest error such as void judgments. The memorandum further emphasized the binding effect of political recognition of Indian tribes on the courts, the political question doctrine, and the exclusive federal power to terminate an Indian tribe and its reservation, as well as other relevant propositions (Attachment "G").

Four days after petitioner filed its motion, the Circuit Court entered a six line order without reasoned opinion directing its clerk "to return the tendered papers without filing" (2a).

REASONS FOR GRANTING THE WRIT

The First Circuit's cryptic six line order preventing petitioner from even filing its motion denies petitioner fundamental judicial fairness.

In the opinion of petitioner's present counsel, neither the 1978 District Court hearing nor the 1979 Circuit Court review got into the root law that controls *Mashpee I.* Petitioner's then

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* *See also,* portion of Earle Report in which Massachusetts acknowledges the continuing existence of several Indian tribes, including the Mashpee and their reservation, and which petitioner had proposed to offer in toto at the hearing on its motion. The Mashpee portion of this report without census tables is included in Appendix C of documents to be handed up at filing.

chief counsel, after stipulating that petitioner's standing to sue, that is, its tribal existence, was the threshold question, agreed this legal issue be treated as a question of fact. In addition, he let the chief defense counsel, an experienced trial lawyer, lead him into submitting this legal question to a jury:

> "MR. ST.CLAIR: . . . The fact that there was a jury on this issue is an interesting fact. My memory is very clear, there was no objection to the jury, because, as I well remember, we had fully briefed that question and were somewhat surprised that there was no opposition to the claim of jury." *Recusal Hearing*, CA Nos. 81-3205-S through 81-3209-S, 2 February 1982, Tr. 57.

So for the first time in nearly 200 years of federal Indian law, tribal existence, a legal question, was submitted to a lay non-Indian jury. That the jury was hopelessly confused is underscored by their finding petitioner was not a tribe in 1790, 1869, 1870 and 1976, but was a tribe in 1834 and 1842.

But the root issues controlling the legal existence of petitioner's tribe and reservation: sovereign succession — exclusive federal control — federal recognition — federal termination — political question — separation of powers; all matters of law vital to petitioner's situation, were never even recognized or brought up, let alone put to adversary test or judicial consideration.

As petitioner pointed out in its motion to the First Circuit —

Sovereign recognition of Indian tribes and their reservations can be inherited from a prior sovereign or come about by treaty or report or other official executive or legislative act of the current sovereign.

In petitioner's case, its federal recognition comes not only by inheritance from its prior sovereigns, the Massachusetts Commonwealth and the English Crown, but by inclusion in various tribal inventories, censuses and lists prepared and maintained by the executive and legislative departments of the United States (Attachments "A", "B", "C", "D" of Appendix B).

A leading Court of Claims case underscores the legal effect:

> "(I)f such . . . tribes . . . have not been recognized by treaty, but have been (recognized) by the officers of the Government whose duty it was to report in respect thereto, then the court will accept that as sufficient recognition of the tribe . . . on which to predicate a judgment." *Tully v. United States,* 32 Ct. Cl. 1, 7-8 (1896).

And it is well established the court is bound by such political recognition.

In international affairs, for example, once the executive or legislative — the political — departments of the United States have recognized a foreign sovereign, its courts are bound to do the same. *Oetjen v. Central Leather Co.,* 246 U.S. 297, 301-303 (1918).

And so in Indian affairs, federal political recognition of an Indian tribe binds the courts. *United States v. Holliday,* 70 U.S. (3 Wall) 407, 419 (1866).

And such recognition continues until expressly terminated by Congress. Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims,* 31 Me. L. Rev. 17, 67-68 and n. 262 (1979).

In short, petitioner's present counsel believes *Mashpee I* not only was a procedural aberration but is null and void. The matter of law merits of petitioner's tribal existence and standing to sue were never presented or considered.

Obviously, petitioner believes its tribe is a viable legal entity and its land reserve is federal sovereign trust territory. And petitioner knows its reservation is its primary tribal asset. But deeper still, petitioner knows its tribe is made up of human beings whose reservation is their homeland.

So for petitioner's people to helplessly stand by, as non-Indian land speculators and developers, under color of void Massachusetts legislation, take over more and more of their homeland, and for petitioner's people to see the racial incidents increasing and getting nastier, and for petitioner's people to see their trees cut down — their land bulldozed — the headwaters of their principal river built on — their wildlife driven away — their fishing grounds confiscated — their beaches taken over — all for large profits and summer playgrounds and sprawling condominiums and hot-topped shopping plazas, rends the hearts and souls of these members of a special minority who with their homeland are under the promised protection of the federal government and the federal courts.

But aside from these most compelling human considerations, it seems in petitioner's situation the First Circuit disregards its own rigorous standards for fundamental judicial fairness.

For example —

In a recent case, the court chastized a district judge who summarily and without formal hearing denied an attorney's request for fee award:

> "(T)he summary disposition of the threshold question of entitlement in an informal unrecorded settlement conference followed by issuance of an order denying counsel fees *without an adequate statement of the reasons* for the order *does not meet minimum standards of procedural fairness and regularity*. . . . Nor does an order issued *without a deliberate articulation of its rationale,* including some appraisal of the factors underlying the court's decision, *allow for a disciplined and informed review* of the court's decision." *Sargeant v. Sharp,* 579 F. 2d 645, 647 (1st Cir. 1978) (emphasis added).

And of course, this Supreme Court itself asserts that the right to a full and fair opportunity to litigate an issue is protected by the due process clause of the United States Constitution. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 329 (1971). In fact this Court sets the highest standard for fundamental judicial fairness:

> "Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115, 124 (1956).

Most certainly, if the First Circuit feels the district judge must meet this standard, the circuit judges themselves should do no less.

SUMMARY

Quite simply, petitioner believes its rejected motion presented a strong *prima facie* case.

While the First Circuit may feel the non-Indian community in Massachusetts is better served by keeping a lid on the local Indian situation, and while the respondents may consider the Indians non persons, the legal fact remains that petitioner is one of six tribes in Massachusetts that the United States Justice Department admits have not been terminated. And the further legal fact remains that petitioner's homeland is one of the six land reserves over which the First Circuit admits Massachusetts has had no sovereignty since 1789. *Epps v. Andrus,* 611 F. 2d 915, 916 (1st Cir. 1979), *citing Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974). *Just because the local consequences of these facts may be deeply disquieting is not sufficient reason to deny petitioner hearing or remedy.*

Accordingly, petitioner believes the procedural aberration of *Mashpee I* coupled with the callous invasion of pertitioner's homeland and the gross disregard for petitioner's protected status provide the special circumstances and the strong federal interest waranting recall of mandate. *See, Greater Boston Television Corp. v. FCC,* 463 F. 2d 268 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 950 (1972); *American Iron and Steel Institute v. EPA,* 560 F. 2d 589 (3rd Cir. 1977), *cert. denied,* 435 U.S. 914 (1978).

So if petitioner is a politically recognized non-terminated federal tribe — if petitioner's reservation is federal sovereign trust land — if petitioner's people are wards of the United States and of this Court — if petitioner is entitled to control its homeland — if petitioner does have the benefit of all relevant doubts — if the quality of legal representation and handling of Mashpee I is questionable — if the Mashpee I judgment is void — then

most certainly these are the propositions which should now control Mashpee I. For by federal measure, neither the propositions are new nor their consequences new. So to deny their effect in Massachusetts not only would deny petitioner and its people fundamental fairness as one of our nation's Indian communities, but make a local mockery of carefully-fashioned rules and policies of more than 200 years of federal Indian law.

CONCLUSION

Petitioner submits it should be allowed to file its motion and be accorded full briefing, formal argument (possibly, *en banc*), and reasoned opinion. Under the circumstances, this Court may feel it more appropriate to treat instant pleading as a petition for mandamus, but in whatever form the Court chooses, petitioner would deeply appreciate the relief it seeks.

Respectfully submitted,

ROBERT C. HAHN
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Attorneys for Petitioner

ALBERT MATKOV
WILLIAM A. HAHN
PETER d'ERRICO
Of Counsel

APPENDIX A — ORDER OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1272

MASHPEE TRIBE,

Plaintiff-Appellant,

v.

NEW SEABURY CORP., ET AL.,

Defendants-Appellees.

No. 78-1273

MASHPEE TRIBE,

Plaintiff-Appellee,

v.

NEW SEABURY CORP., ET AL.,

Defendants-Appellants.

No. 78-1274

MASHPEE TRIBE,

Plaintiff-Appellee,

Appendix A

v.

NEW SEABURY CORP., ET AL.,

Defendants-Appellees.

MATTHEW B. CONNOLLY, ETC.,

Defendant-Appellant.

Before COFFIN, Chief Judge,
BOWNES and BREYER, Circuit Judges.

ORDER OF COURT

Entered February 1, 1983

Having reviewed appellant's tendered Motion to Vacated Judgment and to Enter Substitute Judgment Nunc Pro Tunc, and the tendered memorandum in support thereof, and seeing no justification for recalling mandate and reconsidering these cases,

The Clerk is directed to return the tendered papers to counsel without filing.

By the Court:

s/ Dana H. Gallup
Clerk.

(cc: Messrs. Hahn, McElaney, Rollins, St. Clair, Otis, Van Gestel, Mone, and Tureen.)

APPENDIX B

PLAINTIFF-APPELLANT'S MOTION TO VACATE JUDGMENT AND TO ENTER SUBSTITUTE JUDGMENT NUNC PRO TUNC

ATTACHMENT "A" (MORSE REPORT)

ATTACHMENT "B" (McKENNY REPORT)

ATTACHMENT "C" (CONGRESSIONAL REPORT)

ATTACHMENT "D" (SCHOOLCRAFT REPORT)

ATTACHMENT "E" (FEDERAL ANSWER)

ATTACHMENT "G" (PLAINTIFF'S MEMORANDUM OF LAW)

(Printing of these documents are omitted here but will be submitted to the Court upon filing.)

APPENDIX C

PROFFERED ATTACHMENT "F" (EARLE REPORT)

(Printing of these documents are omitted here but will be submitted to the Court upon filing.)

APPENDIX D — LIST OF PARTIES

MASHPEE TRIBE,

PLAINTIFF,

v.

NEW SEABURY CORP., TODD B. ACKERMAN, JILL ACKERMAN, JUNE CHILDS, DAVID N. ALS, ANN V. ALS, ALBERT O. ANDERSON, HAZELBELLE ANDERSON, ADOLPH E. BECKER, DOROTHY L. BECKER, LESLIE E. BECKER, PEYTONIA J. BECKER, NELLIE F. SLATON, WILLIAM H. SLATON, MANUEL BECKWITH, HERBERT P. BICKERSTAFFE, FLORENCE BICKERSTAFFE, DONALD B. BLAKEMAN, NANCY BLAKEMAN, MARVIN BLANK, individually and as trustee, HAROLD PERKINS, individually and as trustee, ROBERT D. BREIVOGEL, MARY L. BREIVOGEL, BRIARWOOD-MASHPEE ASSOCIATION, INC., COLTON H. BRIDGES, Director of the Division of Fisheries and Wildlife of the Commonwealth of Massachusetts, WILLIAM H. BRINE, JR., individually and as trustee, THOMAS L. COUGHLIN, JOHN H. BROOKS, JR., BRYNWOOD ASSOCIATES, INC., KARL AND PASQUALORE, INC., JEAN P. CANNING, CAPE COD 4-H CAMP CORP., JOHN P. CONDON CORP., WILLIAM G. CORY, LOUIS VOSE, WILLIAM E. CROWELL, JR., individually and as trustee, MELVIN J. DANGEL, ROBERT B. DAYS III, individually and as trustee, RICHARD M. DAYS, individually and as trustee, MICHICO DAYS, CURTIS E. DORRIE, JR., CONSTANCE B. DORRIE, JOHN A. DREW, FALMOUTH ROD AND GUN CLUB, INC., FIELDS POINT MANUFACTURING CORP., CAROL R. GOLDBERG, HERBERT GORFINKLE, individually

and as trustee, FRIEDA GORFINKLE, individually and as trustee, SIDNEY R. RABB, ESTHER V. RABB, GREAT RIVER CORP., GREENWOOD DEVELOPMENT CORP., WILLIAM A. HARRIS, individually and as trustee, IRENE C. HARRIS, OLIN C. HENDRIX, J.R.U. REALTY, INC., EUNICE JONES, CAROL B. JONES, MARTHA E. JONES, CLARA CURRIER, PHYLLISS M. JORDON, CAROL A. KONNER, L & L ASSOCIATES, INC., HENRY C. LABUTE, individually and as trustee, ADELE F. LABUTE, HERBERT LEMELMAN, individually and as trustee, ROBERT E. LENK, MALCOLM E. MACDONALD, individually and as trustee, PATRICIA R. MACDONALD, EARLE M. MARSTERS, individually and as trustee, WILLIAM J. MARSTERS, individually and as trustee, MARY L. MARSTERS, JAMES A. MCDONALD, JR., ROBERT R. MCNUTT, JR., GRACE C. MCNUTT, MITCHELL ENTERPRISES, INC., DOROTHY F. MORZE, individually and as trustee, NEW BEDFORD GAS & EDISON LIGHT CO., NEW SEABURY CONVEYANCING CO., INC., CLARENCE H. NEWTON, WILLIAM E. NEWTON, GEORGE H. LEBHERZ, JR., OCKWAY BAY DEVELOPMENT CORP., A.B.C. DRYWALL CO., INC., ELISE M. OTIS, ELIZABETH A. NILSSON, JEAN A. BRADLEY, ADELINE OWENS, LEONARD W. PECK, MARGARET S. PECK, DONALD H. PRIESTLY, individually and as trustee, PAUL A. LIPPER, individually and as trustee, GEORGE E. PRIESTON, REDBROOK CORP., E. ARTHUR ROBINSON, individually and as trustee, RALPH G. ANGUS, individually and as trustee, FLORENCE H. RYDER, VIRGINIA RYDER, MALCOLM E. RYDER, CARLETON H. COLLINS, MARION H. COLLINS, ROBERT B. SANTOS, LOUIS SANTOS, JR., BENVINDA G. LEIGHTON, AURORA G. GRACA, FIRST NATIONAL BANK OF BOSTON, co-executor of the estate of Frank F. Savage, DONALD T. DEVINE, co-executor of the estate of Frank F. Savage, SEA-LAKE CORP., JOHN F. SHIELDS, JOHN B. COTTON, WILLARD C. WEANER, THOMAS M. SHIELDS,

MARY JANE SHOOP, HAROLD H. SLATE, HERBERT FLASHMAN, JAMES H. SMITH, NORMAN EPSTEIN, FRANCIS A. SOUTHWICK, individually and as trustee, WILLIAM W. SPRAGGS, VENICE T. SPRAGGS, JOHN C. STERGE, individually and as trustee, KALY T. STRATIS, individually and as trustee, GEORGE H. THOMPSON, PHYLLIS P. THOMPSON, TOWN OF MASHPEE, THE TRUSTEES OF RESERVATIONS, ANTHONY P. UMINA, individually and as trustee, JOHN R. UMINA, HARRY SHUMAN, individually and as trustee, JACOB KAGAN, individually and as trustee, THOMAS K. WARNER, individually and as trustee, NORMAN F. BARRETT, JR., individually and as trustee, JOHN G. MCMANUS, individually and as trustee, EDWARD R. WASIL, individually and as trustee, HELEANA M. WASIL, individually and as trustee, STANLEY J. WASIL, THERESA A. WASIL, PEMBERTON WHITCOMB, RUSSELL MAKEPEACE, MAURICE MAKEPEACE, WILLIAM M. ATWOOD, THOMAS OTIS, GEORGE A. WINSLOW, individually and as trustee, RUTH S. WINSLOW, individually and as trustee, STEVE ZAGLAKAS, JEAN E. MANOOG,

DEFENDANTS*

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* NOTE: This case was certified as a defendant class action, with Mr. St. Clair designated lead counsel.

Office-Supreme Court, U.S.
FILED
SEP 16 1983
ALEXANDER L. STEVAS,
CLERK

UNITED STATES SUPREME COURT

MASHPEE TRIBE Petitioner	)	
v.	)	No. 82-2146
NEW SEABURY CORP. ET ALS Respondents	)	
MASHPEE TRIBE ET ALS Petitioners	)	
v.	)	No.
JAMES G. WATT ET ALS Respondents	)	
FRANK B. JAMES ET ALS Petitioners	)	
v.	)	No.
JAMES G. WATT ET ALS Respondents	)	

PETITIONERS' AND INTENDED PETITIONERS'
CONSOLIDATED MOTION FOR DEFERRED CONSIDERATION

Petitioners and intended petitioners in captioned cases ask the Court defer consideration of the pending petition for certiorari in MASHPEE TRIBE v. NEW SEABURY CORP. ET ALS, No. 82-2146 (MASHPEE I) until two remaining petitions for certiorari now being prepared in MASHPEE TRIBE ET ALS v. JAMES G. WATT ET ALS (MASHPEE II) and FRANK B. JAMES ET ALS v. JAMES G. WATT ET ALS (GAY HEAD II) have been filed, hopefully on or before 30 days from this day, so the Court may consider all three petitions as a group, and state the following reasons therefor:

1. On 18 December 1981, petitioners' counsel entered six Indian land claim cases in the U. S. District Court in Boston, on behalf of the six tribal groups, their members-descendants and their six homelands (totaling about 24,000 acres) still legally extant in Massachusetts;
2. In each case, claiming under the federal Indian common law, the Constitution and the Nonintercourse Act, plaintiffs allege non-terminated, matter of law, politically recognized federal tribe and federally recognized reservation. And in each case plaintiffs allege void, post-1789 Massachusetts interference with their tribe, their homeland and their commons therein;
3. Five of the cases including MASHPEE II, were drawn by the same District Judge who handled MASHPEE I. The sixth case (GAY HEAD II) was assigned to the District Judge handling GAY HEAD I (a still untried 1974 case brought by an earlier group of Gay Headers);

4. On 30 June 1982, Judge Skinner (who had dismissed MASHPEE I in 1978 for lack of standing to sue), dismissed MASHPEE II, barring the tribal claim on collateral estoppel (despite newly asserted matter of law standing), and the individual claims for lack of Nonintercourse Act standing (styling the common law and constitutional claims as merely derivative of the Act);
5. On 17 December 1982, Judge McNaught dismissed GAY HEAD II, not accepting plaintiffs' class action as tribally representative, and agreeing with Judge Skinner that individual plaintiffs had no Nonintercourse Act standing and their federal common law and constitutional claims being derivative of said Act provided no independent basis for relief;
6. Instant petitioners appealed MASHPEE II and GAY HEAD II to the First Circuit. The four companion cases before Judge Skinner and GAY HEAD I before Judge McNaught have so far not been heard or scheduled for hearing;
7. On 28 January 1983 (five weeks before MASHPEE II was argued), the MASHPEE I plaintiff moved the First Circuit Court vacate its 1979 judgment. The Court's unreasoned six line refusal to let the motion be filed (see attachment "A"), is the focus of the first petition for certiorari now before this Court. See "Question Presented", attachment "B";
8. On 23 May 1983, the First Circuit (who too had grounded MASHPEE I dismissal on lack of standing to sue) dismissed MASHPEE II on "elementary principles of res judicata." See attachment "C". This unreasoned conclusory dismissal is the focus of petitioners' second petition for certiorari now being prepared. See proposed "Question Presented", attachment "D";
9. On 24 August 1983, the First Circuit upheld dismissal of GAY HEAD II. See attachment "E". The Court agreed that petitioners either individually or as a class had neither Nonintercourse Act standing nor federal common law or direct constitutional standing;
10. And in an unusual construct, the First Circuit defended Massachusetts' federally unauthorized post-1789 termination of the Gay Head tribe, emancipation of its members, release of their Reservation alienation restriction and conversion of their federal tribe into a Massachusetts town, as a legitimate exercise of the

Commonwealth's general police power and so-called fee title, styling them as powers over Indians reserved by the 13 original States. For proposed "Questions Presented", see attachment "F".

Petitioners believe the First Circuit's summary handling of the two Mashpee cases and its denial of federal Indian common law and direct constitutional standing, coupled with its rationale in GAY HEAD II asserting residual State Indian powers, not only is critical to all six pending Indian cases in Massachusetts but to similar considerations in all 13 original states.

Accordingly, to conserve judicial resources as well as to save all parties substantial effort, time and money, it would seem reasonable if petitioners' pending cert petition and the two about to be filed were consolidated for consideration by the Court.

Respectfully submitted,

15 September 1983

ROBERT C. HAHN
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40 Court St., Rm. 920
Boston, Mass. 02108
1-617-523-2213

"A"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1272.

WAMPANOAG TRIBE,
Plaintiff, Appellant,

v.

NEW SEABURY CORP., ET AL.,
Defendants, Appellees.

No. 78-1273.

WAMPANOAG TRIBE,
Plaintiff, Appellee,

v.

NEW SEABURY CORP., ET AL.,
Defendants, Appellants.

No. 78-1274.

WAMPANOAG TRIBE,
Plaintiff, Appellee,

v.

NEW SEABURY CORP., ET AL.,
Defendants, Appellee.

WESTERN B. CORNELLY, ETC.,
Defendant, Appellant.

Before COFFIN, Chief Judge,
ALDRICH and BREYER, Circuit Judges.

ORDER OF COURT

Entered February 1, 1979

Having reviewed appellant's tendered motion to Vacated Judgment and to Enter Substitute Judgment Nunc Pro Tunc, and the tendered memorandum in support thereof, and seeing no justification for recalling mandate and reinstating these cases,

The Clerk is directed to return the tendered papers to counsel without filing.

By the Court:

[illegible]
Clerk.

"B"

QUESTION PRESENTED

Did the First Circuit deny judicial due process by summarily ordering its Clerk, without reasoned opinion, to return without filing Indian petitioner's motion that the court exercise its inherent corrective power to vacate its 1979 judgment and enter substitute judgment *nunc pro tunc*, said motion presented on three documented *prima facie* grounds:

1. During the 1979 proceeding, petitioner's then chief counsel had not brought either to the District or Circuit Court's attention that petitioner had been a matter of law, non-terminated, politically recognized federal tribe at least since 1789, such political recognition bound the court, and petitioner's continuous federal wardship and federal standing to sue as a special juristic person was a required consequence;

2. Accordingly, the Circuit Court's affirmance of a judgment of dismissal by the District Court based on a negative jury finding on the legal question of petitioner's tribal existence and consequent lack of "standing to sue", was void as a matter of law;

3. Any doubt about correcting this procedural aberration, should be resolved in favor of petitioner as a federally protected political community and ward of this Court?

"C"

MASHPEE TRIBE, et al., Plaintiffs, Appellants,

v.

James G. WATT, et al., Defendants, Appellees.

No. 82-1562.

United States Court of Appeals, First Circuit.

Argued March 7, 1983.

Decided May 20, 1983.

Before BOWNES and BREYER, Circuit Judges, and CAFFREY,* District Judge.

PER CURIAM.

We have examined the record in this case and the prior case, *Mashpee Tribe v. Town of Mashpee*, 447 F.Supp. 940, 950 (D.Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979), with care, and we have reached three conclusions. First, the decision in the prior case rested on the tribe's inability to prove an essential element of its substantive claim, its continued tribal identity; the dismissal order therefore was a judgment on the merits rather than a dismissal for lack of subject matter jurisdiction. Second, all claims in this case are either the same as, or logically dependent upon, the basic claim presented in the first case—namely, whether the Mashpee Tribe is legally entitled to its "tribal land" in and around Mashpee, Massachusetts. *See generally Epps v. Andrus*, 611 F.2d 915 (1st Cir.1979); *Shulthis v. McDougal*, 170 F. 529, 533 (8th Cir.1909), *appeal dismissed*, 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205 (1912); *United States v. Felter*, 546 F.Supp. 1002, 1022 (D.Utah 1982); F. Cohen, *Handbook of Federal Indian Law* 605-11 (1982 ed.). Third, this claim was fairly litigated in the first suit, and the interests of the tribe and its members were fully and fairly represented. *See, e.g., Tenderry v. Lee*, 313 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Nathan v. Rowan*, 651 F.2d 1223 (6th Cir. 1981); *Haas v. Hauenstein*, 575 F.2d 674, 677 n. 4 (9th Cir.1978).

[1-3] Under these circumstances, the effort to relitigate the tribe's claim is barred by elementary principles of res judicata. *See Restatement (Second) of Judgments* §§ 19, 24 (2), 41 (1982); 3 Bracton, *On the Laws and Customs of England* 351-52 (S. Thorne trans. 1977) (circa 1250). The addition of other defendants and parcels of land does not change the result, for title to all Mashpee land is what was, and what remains, at stake. *See Menoir v. Bowie*, 118 F.2d 435, 440 (1st Cir.), *cert. denied sub nom. Rice v. Bowie*, 314 U.S. 629, 62 S.Ct. 76, 86 L.Ed. 513 (1941); *Mertes v. Mertes*, 350 F.Supp. 472 (D.Del.1972), *aff'd by order*, 411 U.S. 961, 93 S.Ct. 2141, 36 L.Ed.2d 681 (1973); *Restatement (Second) of Judgments* §§ 25, 43 comment c (1982). Indian land claims are not entitled to a special exemption from these principles. *See Arizona v. California*, ___ U.S. ___, ___, 103 S.Ct. 1382, 1395, 75 L.Ed.2d 318 (1983) (dictum); *Heckman v. United States*, 224 U.S. 413, 445-46, 32 S.Ct. 424, 434, 56 L.Ed. 820 (1912). Our examination of the trial record confirms our previous conclusion that the trial court was not biased; we deny the plaintiffs' second motion to disqualify the trial judge, as well as all remaining motions.

The judgment of the district court is affirmed. 542 F.Supp. 487. The petition for mandamus and [illegible] are denied.

"D"

QUESTION PRESENTED

Did the First Circuit deny judicial due process, when after a four-year interval, without reasoned opinion and without Constitutional power, the Court summarily changed its original ground for dismissing Indian petitioners' first case (MASHPEE I), from lack of standing to sue to failure on the merits, so to preclude Indian petitioners' second case (MASHPEE II), thereby:

1. Denying Indian petitioners the chance to cure their standing problem by showing non-terminated, matter-of-law federal political recognition and consequent standing to sue, a juridical fact overlooked by petitioners' original chief counsel when he agreed to submit "tribal existence", a law question, to a non-Indian lay jury in MASHPEE I;
2. Denying Indian petitioners the chance to have their land claim considered on the merits as now being accorded their Indian brethren, the Oneidas and the Cayugas in New York;
3. Denying those individual Indian petitioners not involved in MASHPEE I, their chance to present their definition of tribe as a basis for declaration of their derivative rights to commons;
4. Denying Indian petitioners the benefit of every well-settled long-standing procedural and substantive federal rule and policy regularly accorded other litigants and other wards of the United States?

"E"

United States Court of Appeals
For the First Circuit

No. 91-1026

FRANK B. JAMES, ET AL.,

Plaintiffs, Appellants,

v.

JAMES G. WATT, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. John J. McNaught, U.S. District Judge]

Before

Coffin and Breyer, Circuit Judges,

and Selya,* District Judge.

Robert C. Hahn, with whom William A. Hahn, and Hahn & Matthews were on brief, for appellants.

Allan van Gestel, with whom Andrew S. Hogeland, and Goodwin, Procter & Hoar were on brief, for appellees Christopher S. Cook, Jr., as Sheriff of Dukes County, Beverly A. King, as Register of Deeds for Dukes County, and Alexander D. Forbes, Trustee.

Thomas N. Tarrant, with whom Tarrant & Margolin was on brief, for appellee Wampanoag Tribe of Gay Head.

Thomas O. Bean, Assistant Attorney General, with whom Francis X. Bellotti, Attorney General, and Paul B. Matthews, Assistant Attorney General, were on brief, for appellee Commonwealth of Massachusetts.

Jacques B. Gelin, Attorney, Department of Justice, with whom Carol E. Dinkins, Assistant Attorney General, William F. Weld, United States Attorney, and Anne S. Almy, Attorney, Department of Justice, were on brief, for appellee United States Secretary of Interior.

August 21, 1991

* Of the District of Rhode Island, sitting by designation.

BREYER, Circuit Judge. The plaintiffs in this case are individual Indians who claim an interest in land on Gay Head Peninsula, Martha's Vineyard, Massachusetts. In order to prevail, they must upset the present landowners' chain of title by showing that certain conveyances made many years ago by the Gay Head Indian tribe (or by individual Indians) are invalid. The district court granted summary judgment against the plaintiffs, from which they appeal. We find that the district court was correct.

A

The plaintiffs' initial argument is based upon the Indian Nonintercourse Act (the INA) -- a federal statute that provides:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177. The plaintiffs argue that the relevant conveyances were not made pursuant to a "treaty or convention," that Massachusetts law could not authorize what the INA forbade, and that the conveyances are therefore invalid. The district court correctly rejected this argument, however, on the ground that the plaintiffs sued as individual Indians. The plaintiffs did not seek to represent the tribe, nor did they name the

tribe as a plaintiff in the suit. We are not certain why they did not do so. But we know that the Gay Head Indian tribal government earlier filed a related suit by, and on behalf of, the Gay Head tribe; and we believe that plaintiff Indians here are dissidents who disapprove of the way that suit is being handled. This litigation strategy apparently played a role in the framing of their complaint.

Regardless, this court has held that the INA was designed to protect the land rights only of tribes; that the INA therefore granted a cause of action to tribes; and that individual Indians could not assert INA rights on their own behalf. See Eppa v. Andrus, 611 F.2d 915, 917 (1st Cir. 1979); Wampee Tribe v. New Seabury Corp., 592 F.2d 575, 581 (1st Cir. 1979), cert. denied, 444 U.S. 864 (1979); see also Wampee Tribe v. Watt, 542 F. Supp. 797, 803 (D. Mass. 1982), affd, 707 F.2d 33 (1st Cir. 1983); Oneida Indian Nation v. County of Oneida, 414 F. Supp. 527, 537 (N.D.N.Y. 1977); Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F. Supp. 798, 803 (D.R.I. 1976). In Eppa v. Andrus, 611 F.2d at 917 (original in ital.), we explicitly stated that to invoke the INA a plaintiff "must show that . . . it is or represents an Indian 'tribe' within the meaning of the Act. . . ." That holding is stare decisis in this circuit, and we shall not reexamine it. Thus, plaintiffs' claim, insofar as it is based on the INA, must fail.

II

The plaintiffs raised another argument below, which they now press strongly on appeal. They argue that the Indian Commerce Clause, U.S. Const. art. I, § 8, automatically (in and of itself, without the INA) invalidated the Massachusetts statutes permitting the conveyances in question. See 1870 Mass. Acts ch. 213; 1960 Mass. Acts ch. 483; 1962 Mass. Acts ch. 184, and that the conveyances were therefore invalid. The Indian Commerce Clause grants to Congress the "Power . . . To regulate Commerce . . . with the Indian Tribes . . . ." In the plaintiffs' view, this grant of power is exclusive, and took from Massachusetts all power to legislate in the area of Indian affairs.

Plaintiffs' proposed interpretation of the Indian Commerce Clause closely resembles James Madison's view of the Interstate Commerce Clause, U.S. Const. art. I, § 8. Madison, believing it essential that states not be able to restrict trade among themselves, The Federalist No. 42 (J. Madison); 3 The Records of the Federal Convention of 1787 at 478, 547-48 (M. Farrand ed. 1937), apparently assumed that the mere existence of the Clause precluded state legislation regulating interstate commerce, regardless of whether Congress chose to exercise its full right to legislate. See (L. Tribe, American Constitutional Law § 6-7 (1978); Pyle, Taming the Interstate Commerce Clause in Vain, 91 Yale L. J. 425, 431 (1982); cf. Tribe, Toward A Syntax of the Unwritten: Construing the Bounds of Congressional and Constitutional Silence, 17 Ind. L. J. 515, 521 (1982) (hereinafter cited as "Tribe, Silence"). In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824), Chief Justice Marshall, following the Madisonian interpretation, suggested that the Clause not only grants Congress regulatory power over interstate commerce, but also "excludes, necessarily, the action of states that would perform the

same operation on the same thing." Soon after Chief Justice Marshall's tenure, however, the Supreme Court began to expand the area in which states were free to act. See, e.g., The License Cases, 46 U.S. (5 How.) 504, 573-74 (1847); L. Tribe, American Constitutional Law § 6-3. And, modern cases use a particularized analysis, weighing the strength of relevant state and federal interests, to determine whether or not the Interstate Commerce Clause forbids a particular state law as an unconstitutional "burden" on interstate commerce. See, e.g., Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186-87 (1950); Southern Pacific Co. v. Arizona, 325 U.S. 761, 770-71 (1945); L. Tribe, American Constitutional Law § 6-8. Thus, the strong Madison/Marshall "preemptive" view of the Interstate Commerce Clause is no longer the law of the land. See L. Tribe, American Constitutional Law §§ 6-4 to 6-26.

Similarly, in citing Chief Justice Marshall's strong, preemptive interpretation of the Indian Commerce Clause, plaintiffs overstate the force of the Clause under modern Indian law. In Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), for example, the Chief Justice wrote that "[t]he whole intercourse between the United States and this [Cherokee] nation, is, by our constitution and laws, vested in the government of the United States." See also Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 19 (1831) (Marshall, C.J.). Nevertheless, despite similar dicta in some later cases, see, e.g., Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974), Supreme Court decisions since Chief Justice Marshall's time have generally rejected the concept that the Clause automatically and necessarily preempts all state laws dealing with Indians. Instead, these decisions have tended to expand the area in which states may legislate. See, e.g., Rice v. Rehner, 51 U.S.L.W. 5141, 5144-46 (U.S. July 1, 1983); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 481 n.17 (1976); Organized Village of Kake v. Egan, 369 U.S. 60, 74-76 (1962); United States v. McGowan, 302 U.S. 535, 539 (1938); New York v. Dibble, 62 U.S. (21 How.) 366, 370 (1858). And, when the Supreme Court has found state legislation preempted, it has used an analysis that balances the interests of the federal, state, and tribal authorities, rather than any rule that automatically preempts state statutes on the basis of the Clause. See, e.g., New Mexico v. Mescalero Apache Tribe, 51 U.S.L.W. 4741, 4743 (U.S. June 13, 1983); Ramah Navajo School Board, Inc. v. Bureau of Revenue, 50 U.S.L.W. 5101, 5102 (U.S. July 2, 1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 (1973). This shift in the method of analysis is fatal to plaintiffs' case for one simple reason: plaintiffs' reliance on supreme cases upon a strict, shall/shall not view of Indian Commerce Clause preemption. Any "interest balancing" approach -- in view of the enactment of the IWA -- leads to the conclusion that the Indian Commerce Clause does not preempt the application of the relevant Massachusetts laws to this case.

To see why this is so, first imagine the circumstances in which plaintiffs' preemption argument would be strongest on merits, if Congress had never enacted the IWA. Even under those circumstances, one could make a strong argument for the validity of the state [illegible] on an argument based upon the special, bifurcated nature of Indian land title. That argument would run as follows:

v. County of Oneida, 414 U.S. at 667, American courts recognize two distinct levels of ownership in Indian lands: fee title and Indian title. The common-law fee title passed to the European sovereign at discovery, and it could be transferred by him to his grantees. The fee title in lands that the British king retained passed to the individual states at the time of the revolution. These states, in turn, ceded to the central government their claims to the western territories beyond their present boundaries. Title to Indian lands within their borders, however, was retained by the thirteen original states. (To the extent that our comment in Pope v. Andrus, 611 F.2d at 916 suggests the contrary, it is withdrawn.) See Oneida Indian Nation v. County of Oneida, 414 U.S. at 670; Seneca Nation v. Christy, 162 U.S. 283 (1896); United States v. Franklin County, 50 F. Supp. 152, 156 (N.D.N.Y. 1943); Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 36 & n.73 (1979); Dwyer, Land Claims Under the Indian Nonintercourse Act, 25 U.S.C. § 177, 7 B.C. Env. Aff. L. Rev. 259, 265 n.41 (1978); cf. M. Jensen, The Articles of Confederation 198-218 (1966) (historical background to land cessions).

Indian title, which gave Indians a "right of occupancy," coexisted with the fee title. This "right of occupancy" was legally significant in several ways. For one thing, only the sovereign (the king, the state, the federal government) could destroy this right; and, as long as the Indians retained it, ownership of the fee title brought with it no present right of possession. Rather, the fee owner "received a contingent future interest which ripened into a fee simple" only when the Indians abandoned their possessory interest (or when the sovereign, holding fee title, took that possessory interest). F. Cohen, Handbook of Federal Indian Law 321 n.372 (1942). For another thing, the courts did not otherwise recognize transactions involving this "right of occupancy." Because the owner of fee title held the "exclusive right to extinguish" the "right of occupancy", Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 585 (1823), efforts by Indians to convey their possessory rights were not recognized by American courts. Instead, one who purchased such rights from the Indians "incorporate[d] himself with them;" if the Indians chose to take their rights back, as far as the U.S. courts were concerned, that was up to them. Id. at 591. All these, and related rules, were explained by Chief Justice Marshall in Johnson v. McIntosh, and were reaffirmed in subsequent cases. See, e.g., Oneida Indian Nation v. County of Oneida, 414 U.S. at 667-74; Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-81 (1955); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 345-46 (1941); United States v. Shoshone Tribe of Indians, 304 U.S. 111, 115-16 (1938); Cramer v. United States, 261 U.S. 219, 229-30 (1923); Buttz v. Northern Pacific Railroad, 119 U.S. 55, 66-67 (1886); Beecher v. Wetherby, 95 U.S. 517, 525 (1877); Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835) (Marshall, C.J.); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (Marshall, C.J.); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (Marshall, C.J.); Jackson v. Porter, 13 F. Ca[illegible] 5, 240 (N.D.N.Y. Cir. Ct. 1825) (No. 7,143).

Against this background, one might argue that the Massachusetts statutes giving Indians fee title and the power to alienate land, were not efforts to take land rights from the Indians, but rather efforts to convey the state's fee title to them and thereby to grant them their lands in fee simple absolute. These statutes may have been Massachusetts' own attempt to undo its earlier cases and statutes limiting the rights of Indians in their aboriginal lands to possessory title and invalidating conveyances of that title. See 1701 Mass. Prov. Laws ch. 11; The Book of the General Lavves and Libertyes Concerning the Inhabitants of the Massachusets (1660), at 161 (statute enacted 1633), reprinted in The Colonial Laws of Massachusetts (1889 ed.); City of Lynn v. Inhabitants of Nahant, 112 Mass. 433, 449 (1873); Commonwealth v. City of Roxbury, 72 Mass. (9 Gray) 451, 478-79 (1857); Brown v. Inhabitants of Wenham, 51 Mass. (10 Met.) 495, 498 (1845); Clark v. Williams, 36 Mass. (19 Pick.) 499, 500-01 (1837). Thus, these statutes might be seen as part of an effort to remove the legal disabilities of the Indians and grant them full citizenship -- as part of an effort that included the passage of an 1869 statutory provision granting Indians "all the rights, privileges and immunities" of state citizens, 1869 Mass. Acts ch. 463, § 1, and the ratification by Massachusetts of the Fourteenth Amendment in 1867.

We need not decide whether this explanation of the Massachusetts statutes would have been sufficient to render them constitutional, despite the Indian Commerce Clause, in a hypothetical world without the INA. One could still have attacked them as unconstitutional by arguing that, regardless of the motives of the Massachusetts legislature, the statutes allowed the Indians to convey title to their lands; that the Indian Commerce Clause was designed to place in the hands of the federal government the decision of whether to allow conveyances by Indians; and that the Clause therefore "froze" the land rights of the various Indian tribes until either they voluntarily abandoned their lands or Congress voted to permit a conveyance. One could note, as well, that the question of "when the Indians are prepared to exercise the privileges and bear the burdens of one sui juris" is a matter that "rests with Congress." United States v. Nice, 241 U.S. 591, 598 (1916). On the other hand, one could have argued, in support of the statutes, that Massachusetts was entitled under its general police powers to provide a fair, expeditious, and judicially recognized mechanism for a tribe to convey its possessory rights to its own members if it chose to do so, and that Massachusetts was entitled as fee owner to transfer its title to such members of the tribe. One might add that Massachusetts' primary objective was apparently to help integrate into the non-Indian community those individual Indians who wished to do so, and that it did this without interfering with the area of primary federal concern -- the "commerce" between the "settlers" and the semi-autonomous tribes. We do not pretend to know who would have won this hypothetical argument. We wish only to point out that -- even without the INA -- the Massachusetts statutes are not clearly unconstitutional; rather, the outcome of the argument is uncertain. See generally T[illegible] Silence, supra, (explaining difficulties of interpret[illegible] congressional failure to legislate).

Next consider how the relevant features of the constitutional argument change once one takes account of the fact that Congress passed and modified the INA, 1 Stat. 137 (1790); 4 Stat. 729 (1834), to allow Indian tribes to invalidate transfers of (fee or Indian) title to their lands, if the transfers were made without the specific approval of the federal government. For one thing, the constitutional question itself changes. The INA clearly preempts state statutes that conflict with its terms. But, the relevant question now is whether the Indian Commerce Clause preempts state statutes outside the INA's scope. For another thing, the INA reflects a congressional judgment about the weight of the relevant federal, state, and tribal interests -- interests that the Supreme Court has instructed us to balance to determine whether the Indian Commerce Clause preempts a particular state enactment. See Rice v. Rehner, 51 U.S.L.W. at 5142-44; New Mexico v. Mescalero Apache Tribe, 51 U.S.L.W. at 4743-44; Ramah Navajo School Board, Inc. v. Bureau of Revenue, 50 U.S.L.W. at 5102; White Mountain Apache Tribe v. Bracker, 448 U.S. at 145. That congressional judgment helps us conclude that this "balance" tilts decisively in favor of the application of the state laws. First, the terms of the Indian Commerce Clause itself grant the federal government the authority to regulate commerce "with the Indian tribes." Although the federal government may choose to supervise transactions involving individual Indians, see, e.g., United States v. Nice, 241 U.S. at 600, the modified (1834) INA indicates that Congress consciously chose not to do so, but, rather, to limit its supervision under the INA to transactions and lawsuits involving the tribes themselves. These facts suggest that the federal interest in nontribal transactions is comparatively small. Cf. New Mexico v. Mescalero Apache Tribe, 51 U.S.L.W. at 4744 (to find whether a federal interest exists, examine whether the interest is "reflected in federal law").

Second, where individual Indians are involved, the state has a valid interest in maintaining the stability of land transactions entered into according to its laws, in treating all of its citizens equally, and in providing the same property rights to all of its citizens. These factors support Massachusetts' power to act in the area.

Third, the interest of the tribe itself is smaller outside the area that the INA protects. In this case, application of the state statutes against the plaintiffs will conflict with no claim that the tribe itself might assert, and will not "interfere with the Tribe's ability to exercise its governing functions." Ramah Navajo School Board, Inc. v. Bureau of Revenue, 50 U.S.L.W. at 5102. Given the lack of any substantial federal or tribal interests that significantly favor preemption, "the state interests at stake are sufficient to justify the assertion of state authority." New Mexico v. Mescalero Apache Tribe, 51 U.S.L.W. at 4744.

Finally, even though "congressional intent" is not the "sole touchstone" of preemption analysis, New Mexico v. Mescalero Apache Tribe, 51 U.S.L.W. at 4744, it does support the enforcement of the state statutes in this case. The original enactment of the INA in 1790 suggests that the first Congress did not believe that the Indian Commerce Clause -- in and of itself -- prohibited state laws validating Indian land

conveyancer. Otherwise, why would the INA have been necessary? The views and actions of the first Congress, made up of many of the Constitution's framers, are entitled to considerable weight in cases like this of constitutional interpretation. See Wisconsin v. Pelican Insurance Co., 127 U.S. 265, 297 (1888), quoted with approval in Marsh v. Chambers, 51 U.S.L.W. 5162, 5164 (U.S. July 5, 1983). Moreover, Congress' modification of the INA in 1834, limiting its applicability to tribal conveyances, suggests that Congress believed that similar activities beyond the scope of the INA did not "stand[] as an obstacle to the accomplishment," Hines v. Davidowitz, 312 U.S. 52, 67 (1941), of the objectives it hoped to accomplish through the statute. We should hesitate to find the federal interest in activities outside the scope of the statute "weighty" enough to warrant preemption in the face of such a contrary congressional suggestion. See id. at 70 ("Object sought to be attained" by Congress is "important in considering . . . whether supreme federal enactments preclude enforcement of the state laws"); cf. Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) (Congress can limit preemptive scope of Interstate Commerce Clause); Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945) (same). Compare Durousseau v. United States, 10 U.S. (6 Cranch.) 307, 314 (1810) (statute affirmatively describing jurisdiction will "imply a negative" as to jurisdiction not described) with Hines v. Davidowitz, 312 U.S. at 74 (all state regulation preempted where Congress planned for "one uniform national registration system"). In sum, what we can infer about congressional intent supports the conclusion we reached by "weighing the interests" -- that, at least after the enactment of the INA, the Indian Commerce Clause does not invalidate the Massachusetts statutes here in question. Since plaintiffs here cannot assert a claim that falls within the scope of the INA (see Part A supra), and since the Indian Commerce Clause does not offer an independent ground for holding these conveyances invalid, the district court's dismissal of their claim was proper.

C

After their claims were denied below, plaintiffs moved to amend their complaint, inter alia, to include the Gay Head Tribe as a party plaintiff. The district court denied this motion as untimely. The plaintiffs appeal this ruling as well, but we find no basis for reversal. A motion to amend is normally made before judgment. Sometimes a later effort to amend might be proper. See 6 C. Wright & A. Miller, Federal Practice and Procedure § 1489 (1971). But where plaintiffs waited until they lost their case as individuals before moving to include the tribe as plaintiff and they offered no reason to explain why they did not move to amend sooner, accordingly, their motion was properly denied. Mayer v. New England Wine Distributors, Inc., 602 F.2d 17, 19-21 (1st Cir. 1979); Cadin v. Barrows, 538 F.2d 904, 909 (1st Cir. 1976); see United States Labor Party v. Oremus, 619 F.2d 683, 692 (7th Cir. 1980); Jackson v. American Bar Association, 538 F.2d 829, 833 (9th Cir. 1976); Landon v. Northern Natural Gas Co., 338 F.2d 17, 20 (10th Cir. 1964), cert. denied, 381 U.S. 914 (1965).

We have no reason to believe that the plaintiffs' failure to amend earlier was inadvertent. For one thing, their attorney here is the same [illegible]rney who handled the appeal in Poss v. Andrus, supra. [illegible]ore, he was aware of the need to assert that a plaintiff [illegible] represents an Indian tribe." Id. at 917. For another [illegible] as previously mentioned, other

Indians have brought a suit on behalf of the Gay Head tribe to obtain land on the peninsula, and they are presently in the process of settling their suit. The plaintiffs here disagreed with the plaintiffs in the other suit, but they evidently did not, or could not, name the tribe as a party plaintiff in this case because the other plaintiffs control the tribe. These facts suggest to us that the pleadings in this case were drawn as part of a litigating strategy and plaintiffs showed the district court no reason why they should not be bound by the consequences of that strategy. In any event, the issue at stake -- whether plaintiffs here have a right to upset the settlement entered into by the tribe and its other members -- is more appropriately before us in another case appealed to this court, Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head, No. 83-1163, scheduled to be heard this September.

Under these circumstances, we find no abuse of the district court's discretion in its denial of plaintiffs' motion to amend the pleadings. To require the district court to permit amendment here would allow plaintiffs to pursue a case to judgment and then, if they lose, to reopen the case by amending their complaint to take account of the court's decision. Such a practice would dramatically undermine the ordinary rules governing the finality of judicial decisions, and should not be sanctioned in the absence of compelling circumstances. See 6 C. Wright & A. Miller, supra, at § 1489.

Plaintiffs' other claims are without merit, and were properly dismissed.

Affirmed.

QUESTIONS PRESENTED

1. Did the First Circuit err by holding that, irrespective of the federal Constitution and federal sovereignty, Massachusetts (one of the original 13 States) working through its general police powers and so-called fee title to Indian lands within its borders, can unilaterally terminate a federal Indian tribe, emancipate tribal members from federal guardianship, release tribal land from federal alienation restriction, extinguish Indian title and convert a federal tribe into a state municipality?

2. Did the First Circuit err by holding that individual Indians, relying on federal Indian common law, the Constitution and the Trade and Intercourse Act, do not have standing for themselves, their class or their tribe, to seek a declaration of tribal status as a foundation for declarations of their derivative rights to commons in tribal lands, hunting, fishing and other tribal assets?

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1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2146

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

MASHPEE TRIBE,
Petitioner,

v.

NEW SEABURY CORP., ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the Court of Appeals decision that there was no justification for recalling mandate and reconsidering the four year old judgment issued in the instant case.

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD BE DENIED	5
CONCLUSION	11

TABLE OF AUTHORITIES

	PAGE
Ackerman v. United States, 340 U.S. 193 (1950)	9
Couch v. Traveler Ins. Co., 551 F.2d 958 (5th Cir. 1977)	10
Federal, Inc. v. Edmonton Inn Co., 555 F.2d 577 (6th Cir. 1977)	10
Heckman v. United States, 224 U.S. 412 (1912)	8
Mashpee Tribe v. Town of Mashpee, 447 F.Supp. 940 (D. Mass. 1978), aff'd sub. nom., Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979)	1, 2, 3
Mashpee Tribe v. Watt, 542 F.Supp. 797 (D. Mass. 1982); aff'd, 707 F.2d 23 (1st Cir. 1983)	4, 7
Nevada v. United States, ___ U.S. ___, 51 U.S.L.W. 4974 (July 21, 1983)	8, 9
Willens v. University of Massachusetts, 570 F.2d 403 (1st Cir. 1978)	10
Fed.R.Civ.P. 59(e)	6
Fed.R.Civ.P. 60(b)	6, 7, 8
Fed.R.App.P. 40(a)	6

STATEMENT OF THE CASE

This is an attempt to reopen at the appellate level a seven year old case decided adversely to the instant petitioner in the trial court. The original complaint was filed on August 26, 1976, by a group of individuals calling themselves the Mashpee Tribe, who alleged that they had been illegally deprived of their land through the acts of the Massachusetts General Court in 1869 and 1870. Mashpee Tribe v. Town of Mashpee, 447 F.Supp. 940 (D. Mass. 1978), aff'd sub. nom., Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979). (Mashpee I). The Commonwealth participated in that case primarily as one of many land owners whose title to property was called into question.

Mashpee I was submitted to a jury after forty days of trial on the issue of whether the plaintiffs or their ancestors were an Indian tribe within the meaning of the Non-Intercourse Act. The jury, answering special questions, concluded that a Mashpee Tribe did not exist at certain crucial dates, including: July 22, 1790, when the Non-Intercourse Act was first enacted; June 23, 1869, the date on which the Massachusetts General Court removed all restraints on the alienation of Indian land in Massachusetts; May 28, 1870, when the General Court incorporated the Town of Mashpee; or August 26, 1976, the date of the filing of the complaint.

The defendants moved for dismissal upon the return of the jury's verdict. The court held that the evidence sup-

ported the jury's finding that the Mashpees did not constitute an Indian tribe in 1870 or 1976. Therefore, the case was dismissed. The Court of Appeals affirmed that decision, 592 F.2d 575 (1st Cir.), and this Court thereafter denied certiorari, 444 U.S. 866 (1979).

In 1981, three hundred and thirty-four individuals claiming to be members of the alleged Mashpee Tribe filed a new action in the district court.[1/] Despite the decision in Mashpee I, the claim for relief once again relied on the assertion that their rights under the Non-Intercourse Act had been violated by the acts of the Massachusetts General Court in 1869 and 1870. On June 30,

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1/ In the Mashpee I proceeding, the plaintiffs were represented by Thomas Tureen of the Native American Rights Fund. The second Mashpee case was filed by Robert Hahn, as was the Motion to Vacate Judgment which is at issue in this petition.

1982, the District Court issued its memorandum and order granting the various defendants' Motions to Dismiss. Those motions contended, and the trial court held, that the second cause of action was precluded by the first. Seven days later final judgment was entered. Mashpee Tribe v. Watt, 542 F.Supp. 797 (D. Mass. 1982). Thereafter, the First Circuit Court of Appeals upheld the dismissal on appeal. Mashpee Tribe, 707 F.2d 23 (1st. Cir. 1983). No petition for certiorari has as yet been filed.

On January 28, 1983, Mr. Hahn filed a motion in the First Circuit seeking to vacate the 1979 judgment affirming the dismissal in the Mashpee I case. The petitioner has not, however, filed a motion for post-judgment relief in the

district court. The First Circuit reviewed the tendered motion and found no justification for recalling their mandate. The Court directed the clerk to return the papers without filing. The petitioner then filed this petition for writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

This case does not raise any special or important issues that warrant certiorari review. The petition raises no important questions of federal law. It does not present for review a decision which conflicts with any decision of this Court or any other federal court of appeals. Instead, the petitioner contends only that the Court of Appeals erred when it refused to reopen, at the appellate level, a seven year old land

title case decided adversely to it. In fact, the First Circuit's decision was sound and correct, because the petitioner's motion, filed nearly four years after entry of judgment, is time-barred under any rule authorizing post-judgment remedies.

First, post-judgment remedies in the Court of Appeals consist of motions for rehearings and rehearing en banc. Either motion, however, must be filed within fourteen days after entry of judgment. F.R.A.P. 40(a). That date has long since passed.

Second, it is telling that the petitioner filed its motion for post-judgment relief in the appellate court rather than in the district court as provided by Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure. This decision

was based no doubt on the fact that petitioner's motion was time-barred under either rule. Rule 59(e) requires that the motion to alter judgment be filed not later than ten days after entry of judgment. Petitioner is foreclosed from proceeding under that rule.

Similarly, the provisions of Rule 60(b) do not support the petitioner's motion. That rule provides that a motion premised on the first three enumerated grounds be made within a year after judgment; once again, petitioner faces an insurmountable time barrier. Nor can the petitioner find solace in the remaining provisions of Rule 60(b) which require the motion to be filed within a "reasonable" time. An unexplained four year delay in filing is simply not reasonable.

This is especially true where petitioner seeks to relitigate questions which affect title to land.[2/] In cases concerning real property, notions of finality and res judicata are "at their zenith" and, "when once decided, should be considered no longer doubtful or subject to change." Nevada v. United States, ___ U.S. _____, 51 U.S.L.W. 4974, 4979 (July 21, 1983). The mere fact that the petitioner claims to be an Indian tribe does not excuse it from these traditional notions of finality. Such a claim was firmly rejected by this court in Heckman v. United States, 224 U.S. 412 (1912)

2/ Moreover, the petitioner had the opportunity to brief and argue the issues it now seeks to relitigate, in the Mashpee II litigation. In essence, petitioner seeks not a second, but a third bite at the apple. Notions of finality demand that such an attempt be rejected.

and most recently reiterated in Nevada v. United States, supra.

Finally, assuming the motion was filed within a "reasonable" time, the petitioner's motion still does not satisfy the primary requirement of Rule 60(b) that there be justification for relief. The petitioner offers but a single reason to justify the request that this extraordinary remedy be granted; the fact that petitioner's counsel in the original proceeding failed to litigate the case in the manner present counsel would have chosen. This Court, as well as numerous courts of appeal, has rejected that very contention as a justification for the recall of a mandate. Ackerman v. United

States, 340 U.S. 193 (1950).[3] Thus, even were petitioner's motion not time-barred, as it clearly was, it was without sufficient merit to justify the extraordinary relief it sought.

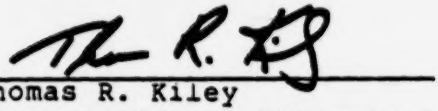
3/ Accord, Federal, Inc. v. Edmonton Inn Co., 555 F.2d 577 (6th Cir. 1977); Couch v. Traveler Ins. Co., 551 F.2d 958 (5th Cir. 1977); Willens v. University of Massachusetts, 570 F.2d 403 (1st Cir. 1978).

CONCLUSION

The petitioner's application for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL



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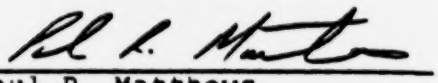

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DATED: July 29, 1983

No. 82-2146.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

MASHPEE TRIBE,
PETITIONER,

v.

NEW SEABURY CORP., ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief of Respondents Town of Mashpee and Mary Jane Shoop, Individually and as Representatives of a Defendant Class, in Opposition to Petition for a Writ of Certiorari.

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Counterstatement of Question Presented for Review.

Whether the Court of Appeals abused its discretion in denying a motion to vacate a 1979 judgment which motion was based on no more than a claim that petitioner's former, retained counsel had made tactical errors in the case which was tried five years earlier.

Table of Contents.

Opinions and judgments below	1
Jurisdiction	2
Counterstatement of the case	2
Summary of argument	6
Argument	6
I. The denial of the petitioner's motion to vacate raises no issues of importance beyond this case and therefore does not warrant review by certiorari	6
II. The Court of Appeals applied settled law and correctly declined to vacate its 1979 judgment and recall its mandate	8
Conclusion	12
Appendix 1	1a

Table of Authorities Cited.

CASES.

American Iron & Steel Institute v. E.P.A., 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978)	10
Estate of Iverson v. Commissioner, 257 F.2d 408 (8th Cir. 1958)	8
Greater Boston Television Corp. v. F.C.C., 463 F.2d 268 (D.C. Cir. 1971), cert. denied sub nom. WHDH, Inc. v. F.C.C., 406 U.S. 950 (1972)	8, 9, 10
Hines v. Royal Indemnity Co., 253 F.2d 111 (6th Cir. 1958)	9
Insurance Group Committee v. Denver & Rio Grande Western Railroad Co., 329 U.S. 607 (1947)	8

Laffey v. Northwest Airlines, Inc., 642 F.2d 578 (D.C. Cir. 1980) 9, 10

Lee v. Terminal Transport Co., 301 F.2d 234 (7th Cir. 1962) 8

Legate v. Maloney, 348 F.2d 164 (1st Cir. 1965) 9

Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977) 10

Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979) ("Mashpee I") 1, 3, 4, 6, 7, 10

Mashpee Tribe v. Watt, 542 F. Supp. 797 (D. Mass. 1982), aff'd, No. 82-1562 (1st Cir. May 23, 1983) ("Mashpee II") 2, 5, 11

National Surety Corp. v. Charles Carter & Co., Inc., 621 F.2d 739 (5th Cir. 1980) 8

Powers v. Bethlehem Steel Corp., 483 F.2d 963, (1st Cir. 1973) 8

STATUTES.

25 U.S.C. § 177 3

28 U.S.C. § 1254(1) 2

FEDERAL RULES AND REGULATIONS.

Sup. Ct. R. 17.1 6

25 C.F.R. Part 54 7n

44 Fed. Reg. 7234-37 (February 6, 1979) 7n

No. 82-2146.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

MASHPEE TRIBE,
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v.

NEW SEABURY CORP., ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief of Respondents Town of Mashpee and Mary Jane Shoop, Individually and as Representatives of a Defendant Class, in Opposition to Petition for a Writ of Certiorari.

Opinions and Judgments Below.

The opinion and judgment of the United States Court of Appeals for the First Circuit which the petition sought to vacate is reported at 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S.

866 (1979). That decision affirmed a judgment of the United States District Court for the District of Massachusetts reported at 447 F. Supp. 940 (1978). The order of the United States Court of Appeals for the First Circuit denying the petitioner's motion to vacate is set forth at Pet. 1a-2a.

An earlier opinion of the United States District Court for the District of Massachusetts in this case is reported at 427 F. Supp. 899 (1977).

The opinion and judgment of the United States District Court for the District of Massachusetts in a subsequent, related proceeding is reported as *Mashpee Tribe* v. *Watt*, 542 F. Supp. 797 (D. Mass. 1982). The opinion and judgment of the United States Court of Appeals affirming that decision is set forth as Appendix 1 to this brief.

Jurisdiction.

The order of the United States Court of Appeals for the First Circuit, denying the petitioner's motion to vacate a February 13, 1979 judgment of that court, was entered on February 1, 1983. On May 23, 1983, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including July 1, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Counterstatement of the Case.

On August 26, 1976, the petitioner, the alleged Mashpee Tribe ("the petitioner"), commenced an action in the United States District Court for the District of Massachusetts claiming

title to essentially all of the land in the Town of Mashpee, Massachusetts, and a small portion of land in the adjoining Town of Sandwich, Massachusetts. The petitioner alleged that the Commonwealth of Massachusetts had authorized the alienation of the claimed land by the petitioner's predecessors in contravention of § 12 of the Indian Trade and Intercourse Act of 1834, now codified in part as 25 U.S.C. § 177 ("the Nonintercourse Act"); and that, consequently, the petitioner was entitled to immediate possession of that land and trespass damages.

Specifically, the petitioner contended that, in 1685, the General Court of the Plymouth Colony granted the claimed land to the petitioner's predecessor in interest subject to a restraint on alienation. *Mashpee Tribe* v. *Town of Mashpee*, 447 F. Supp. 940, 949 (D. Mass. 1978), *aff'd. sub nom. Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) ("*Mashpee I*"). In 1723, this land and its residents were organized as a propriety and, in 1834, as the District of Marshpee. 447 F. Supp. at 944-45. In both its propriety and district forms, the land in Mashpee remained subject to restraints on alienation imposed by the Plymouth Colony and later by the Massachusetts General Court. 447 F. Supp. at 945-46. In 1842, the Massachusetts General Court partitioned and allotted the land in the district to the individual residents subject again, however, to a continued restraint on alienation to non-residents. 447 F. Supp. at 945. In 1869 and 1870, the Massachusetts General Court eliminated its restraint on the conveyance of the previously allotted land to non-residents of Mashpee and incorporated Mashpee as a town. It is these 1869 and 1870 legislative acts which the petitioner asserted violated the Nonintercourse Act.

Mashpee I was submitted to a jury after forty days of trial on the issue whether the petitioner and its claimed predecessors were an Indian tribe within the meaning of the Nonintercourse Act on the date *Mashpee I* was commenced and on certain

other relevant dates. The jury found as a matter of fact that the group was an Indian tribe on March 31, 1834, when the District of Marshpee was established, and on March 3, 1842, the date on which there was a formal partition of land in the district. However, the jury found that the group was not an Indian tribe on July 22, 1790, the date of the enactment of the first version of the Nonintercourse Act; on June 23, 1869, the date on which the Massachusetts General Court removed all restraints on the alienation of Indian land in Massachusetts; on May 28, 1870, the date on which the Town of Mashpee was incorporated; and, on August 26, 1976, the date of commencement of *Mashpee I*. 447 F. Supp. at 943. Based upon the jury's special verdicts, the *Mashpee I* court dismissed the petitioner's claim. On appeal, the United States Court of Appeals for the First Circuit affirmed. *Mashpee Tribe* v. *New Seabury Corp.*, *supra*. On October 1, 1979, this Court denied the petitioner's first petition for a writ of certiorari. 444 U.S. 866 (1979).

On December 18, 1981, the petitioner and certain of its claimed members commenced a second action, again challenging the alienation of the claimed land subsequent to the 1869 and 1870 legislative acts of the Commonwealth of Massachusetts. Because *Mashpee I* had conclusively determined that the petitioner's claimed predecessors were not an Indian tribe in 1869 or 1870, that the petitioner had not been an Indian tribe on the date *Mashpee I* was commenced and, consequently, that the petitioner could not state a claim under the Nonintercourse Act, the respondent Town of Mashpee moved to dismiss this second action on the basis of the doctrines of res judicata and collateral estoppel. The respondent also moved to dismiss the claims of the individual plaintiffs for failure to state a claim upon which relief could be granted.

On June 30, 1982, the District Court dismissed the second action against all defendants except certain United States offi-

cials. *Mashpee Tribe* v. *Watt*, 542 F. Supp. 797 (D. Mass. 1982) ("*Mashpee II*"). The District Court held *inter alia* that (1) the tribal land claims asserted by the petitioner were barred by the doctrines of collateral estoppel and res judicata; and (2) although, for reasons of public policy, it would not apply those doctrines to bar the claims of the alleged individual members of the petitioner, the Nonintercourse Act did not provide the individuals any cause of action.

The petitioner again appealed to the United States Court of Appeals for the First Circuit. On May 23, 1983, that court affirmed, specifically holding that "this effort to relitigate the tribe's claim is barred by elementary principles of res judicata." *Mashpee Tribe* v. *Watt*, No. 82-1562, slip op. at 3 (1st Cir. May 23, 1983); Brief App. at 3a.

After *Mashpee II* had been dismissed by the District Court but while the petitioner's appeal of that decision was pending before the Court of Appeals, the petitioner filed in *Mashpee I* its "Motion to Vacate Judgment and to Enter Substitute Judgment Nunc Pro Tunc." By that motion, the petitioner sought to vacate the 1979 judgment of the Court of Appeals in *Mashpee I* and to substitute a judgment determining the petitioner to be an Indian tribe within the meaning of the Nonintercourse Act despite the jury findings. As the petitioner readily concedes, the only bases for its motion are asserted errors in judgment of the petitioner's *Mashpee I* trial counsel (Pet. 3).

That motion and the supporting memorandum offered by the petitioner were considered by the same panel of judges of the Court of Appeals which had decided *Mashpee I*. After reviewing the motion and memorandum, the Court of Appeals denied the motion on the grounds that there was "no justification for recalling mandate and reconsidering these cases" (Pet. 2a).

Summary of Argument.

The order of the Court of Appeals in issue refusing to vacate a 1979 judgment does not conflict with any decision of this Court, any other court of appeals or any state court of final resort. In addition, the challenged order does not involve any important issue of federal substantive or procedural law. Finally, the Court of Appeals acted within its discretion in denying the motion to vacate a 1979 judgment which motion was based solely upon alleged tactical errors by petitioner's counsel at a trial concluded five years ago.

Argument.

I. The Denial of the Petitioner's Motion to Vacate Raises No Issues of Importance Beyond this Case and Therefore Does Not Warrant Review by Certiorari.

The petitioner does not contend, and indeed could not contend, that the challenged order conflicts with any decision of this Court, Sup.Ct.R. 17.1(c); conflicts with a decision of a state court of last resort, Sup.Ct.R. 17.1(a); or results in a conflict among the courts of appeals, Sup.Ct.R. 17.1(a). Similarly, the order in issue does not decide any important issue of statutory or constitutional law not previously settled by this Court and does not involve any crucial procedural question. Nor does the record even remotely indicate that the Court of Appeals has so far departed from "the accepted and usual course of judicial proceedings . . . as to call for exercise of this Court's power of supervision." *Id.*

Instead, the issue now presented is predicated upon the peculiar and particular facts of *Mashpee I*. The petitioner

argues that its trial counsel in *Mashpee I* erred in permitting the issue of tribal existence within the meaning of the Nonintercourse Act to be submitted to a jury; neglected to argue the legal theory that the petitioner's tribal existence was a legal, and not factual, issue; and failed to present certain documentary evidence which the petitioner incorrectly argues establishes its federal recognition as an Indian tribe[1] (Pet. 3-4). These asserted tactical errors, the petitioner concludes, entitle it to an order vacating the 1979 judgment of the Court of Appeals and to entry of a substitute judgment.

Rather than raising issues sufficiently profound and far reaching to justify review by certiorari, the petitioner's contentions represent no more than a litigant's dissatisfaction with prior judgments which were the result of extended and thorough litigation, which were correct when rendered and are correct today, and which previously were the subject of an unsuccessful petition for certiorari. Because the petition raises no question of importance beyond the factual context of this case but,

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[1] The petitioner repeatedly and disingenuously alleges that it is a "federally recognized" Indian tribe (Pet. 3, 4, 5, 6). As the petitioner is well aware, it has not qualified for federal recognition under the regulations promulgated by the Department of the Interior. 25 C.F.R. Part 54 (Procedures for Establishing That an American Indian Group Exists as an Indian Tribe). Nor has it been included on the official listing of tribal entities having a government to government relationship with the United States. 44 Fed. Reg. 7234-37 (February 6, 1979).

Equally inexplicable are the petitioner's claims that the United States has never terminated it as a federal Indian tribe and its reliance upon an excerpt from the United States' answer in *Mashpee II* to suggest that it has never been terminated. The complete portion of paragraphs 33-34 of the answer states that the "federal defendants admit that the United States has never terminated the Mashpee Tribe, their community or their Reservation *but aver that the United States has never acknowledged the group as an Indian tribe. Thus Congress would have had no occasion to terminate the group* . . ." (emphasis added to omitted portion).

rather, merely quarrels with the unwillingness of the Court of Appeals to reopen issues and arguments already finally resolved, the petition for a writ of certiorari should be denied.

II. The Court of Appeals Applied Settled Law and Correctly Declined to Vacate its 1979 Judgment and Recall its Mandate.

Absent unusual circumstances, an appellate court is required to "refuse to permit the relitigation of matters or issues previously determined on a former review." *Insurance Group Committee* v. *Denver & Rio Grande Western Railroad Co.*, 329 U.S. 607, 612 (1947). This well settled doctrine has led the courts of appeals to uniformly recognize that the recall of an appellate mandate "is an inherent power of the Court of Appeals reserved for special circumstances and 'sparingly exercised.'" *Powers* v. *Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973). *See also Estate of Iverson* v. *Commissioner*, 257 F.2d 408 (8th Cir. 1958). As the Court of Appeals for the District of Columbia Circuit has explained, the power to recall a mandate "is not to be availed of freely as a basis for granting rehearings out of time for the purpose of changing decisions . . . ." *Greater Boston Television Corp.* v. *F.C.C.*, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied sub nom. WHDH, Inc.* v. *F.C.C.*, 406 U.S. 950 (1972). Recall of a mandate is particularly inappropriate where a considerable amount of time has lapsed between the issuance of the mandate and the motion to recall. *See National Surety Corp.* v. *Charles Carter & Co., Inc.*, 621 F.2d 739, 741-42 (5th Cir. 1980) (refusing to recall mandate issued three years before relief from mandate sought); *Lee* v. *Terminal Transport Co.*, 301 F.2d 234, 236 (7th Cir. 1962) (refusing to recall mandate issued 29 months before relief from mandate sought). Equally inappropriate is

the recall of a mandate once rehearing and certiorari have been denied. *See Legate* v. *Maloney*, 348 F.2d 164, 166 (1st Cir. 1965).

The courts of appeals have consistently and uniformly placed strict limitations on their own powers to recall appellate mandates because of "the strong policy of repose, that there be an end to litigation." *Greater Boston Television Corp.* v. *F.C.C.*, *supra*, 463 F.2d at 278. In the words of the Court of Appeals for the District of Columbia Circuit:

> If justice is to be served, there must at some point be an end to litigation; on that account, the power to recall mandates should be exercised sparingly. To warrant divergence from the law of the case, a court must not only be convinced that its earlier decision was erroneous; it must also be satisfied that adherence to the law of the case will work a grave injustice.

Laffey v. *Northwest Airlines, Inc.*, 642 F.2d 578, 585 (D.C. Cir. 1980) (footnote omitted). *See also Legate* v. *Maloney*, *supra*, 348 F.2d at 166 ("If we were in error . . . we believe it would be far greater error to permit reconsideration now after denial of petitions for rehearings and certiorari. There must be an end to dispute."); *Hines* v. *Royal Indemnity Co.*, 253 F.2d 111, 114 (6th Cir. 1958).

As a result of this strong policy of finality, the courts of appeals have recognized at most only five "exceptional circumstances" in which the recall of a mandate may be appropriate. These limited circumstances are (1) to correct clerical mistakes or to make the judgment consistent with the opinion; (2) where there has been a fraud on the court or other misconduct affecting the integrity of the judicial process; (3) where there is a danger of incongruent results in cases pending at the same

time; (4) where it is necessary to revise an unintended instruction to a trial court that produces an unjust result; and (5) where a subsequent decision of this Court showed that the original judgment was "demonstrably wrong." *American Iron & Steel Institute* v. *E.P.A.*, 560 F.2d 589, 594 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *Greater Boston Television Corp.* v. *F.C.C.*, *supra*, 463 F.2d at 278-79. Even if any of these circumstances exists, whether a mandate is to be recalled lies in the appellate court's discretion. *See American Iron & Steel Institute* v. *E.P.A.*, *supra*, 560 F.2d at 594-95.

No exceptional circumstances were presented by the petitioner to the Court of Appeals which would have justified overriding "the policy of repose normally accorded past decisions." *Laffey* v. *Northwest Airlines, Inc.*, *supra*, 642 F.2d at 585. Indeed, the petitioner does not even contend that any of these recognized exceptional circumstances exists. Nor does the petitioner refer to any new or old authority conflicting with the 1979 judgment of the Court of Appeals. Further, the petitioner does not offer any documentary evidence which was not available at the time of the trial of *Mashpee I*; in fact, several of the documents appended to the petition as "Appendix B" were introduced into evidence during the *Mashpee I* trial. Finally, the only legal theory the petitioner now addresses — that federal recognition is dispositive as a matter of law of the issue of tribal existence — was raised and decided in *Mashpee I*. *Mashpee Tribe* v. *New Seabury Corp.*, 427 F. Supp. 899, 902-03 (D. Mass. 1977). Indeed, at that time, the petitioner successfully contended that tribal existence was "a question of fact which is susceptible of proof like any other." *Id.* at 903. Having prevailed on that issue but ultimately having failed in its proof, the petitioner's effort to reverse fields five years later does not provide the exceptional circumstances necessary to justify a recall of mandate.

The present petition is no more than another in a series of attempts to circumvent the salutary doctrine of res judicata by attacking the finality of the Court of Appeals' 1979 judgment. First, the petitioner merely refiled its claims to the same land, against the same defendants and predicated upon the same legal theories. When the *Mashpee II* District Court dismissed that second action as barred by the first judgment, the petitioner adopted a new attack by filing its motion to vacate that earlier judgment. The Court of Appeals recognized the motion as another effort to relitigate previously resolved claims and, finding no justification for recalling mandate, properly denied that motion.

Both in its filing of *Mashpee II* and in its bringing of the motion to vacate judgment, the petitioner has demonstrated a consistent disregard for the policies of finality and repose which lie at the core of the judicial system. Those policies are of particular force where, as here, the very pendency of the action calls into question the title of thousands of innocent landowners to thousands of acres of land. This litigation, now nearly seven years old, must once and for all come to an end with the denial of the petition for a writ of certiorari.

Conclusion.

For the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Appendix 1.

United States Court of Appeals for the First Circuit

No. 82-1562

MASHPEE TRIBE, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

JAMES G. WATT, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before
Bownes and Breyer, *Circuit Judges*,
and Caffrey,* *District Judge*.

Robert C. Hahn, with whom *William A. Hahn*, and *Hahn & Matkov* were on brief, for appellants.

James D. St. Clair, P.C., with whom *William F. Lee*, *David H. Erichsen*, *Donald R. Frederico*, *Hale and Dorr*, and *Morris Kirsner* were on brief, for appellee Town of Mashpee.

* Of the District of Massachusetts, sitting by designation.

Thomas R. Kiley, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Paul R. Matthews*, Assistant Attorney General, were on brief, for appellee Commonwealth of Massachusetts.

May 23, 1983

Per Curiam. We have examined the record in this case and the prior case, *Mashpee Tribe* v. *Town of Mashpee*, 447 F. Supp. 940, 950 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979), with care, and we have reached three conclusions. First, the decision in the prior case rested on the tribe's inability to prove an essential element of its substantive claim, its continued tribal identity; the dismissal order therefore was a judgment on the merits rather than a dismissal for lack of subject matter jurisdiction. Second, all claims in this case are either the same as, or logically dependent upon, the basic claim presented in the first case — namely, whether the Mashpee Tribe is legally entitled to its "tribal land" in and around Mashpee, Massachusetts. *See generally Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979); *Shulthis* v. *McDougal*, 170 F. 529, 533 (8th Cir. 1909), *appeal dismissed*, 225 U.S. 561 (1912); *United States* v. *Felter*, 546 F. Supp. 1002, 1022 (D. Utah 1982); F. Cohen, *Handbook of Federal Indian Law* 605-11 (1982 ed.). Third, this claim was fairly litigated in the first suit, and the interests of the tribe and its members were fully and fairly represented. *See, e.g., Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Nathan* v. *Rowan*, 651 F.2d 1223 (6th Cir. 1981); *Haas* v. *Howard*, 597 F.2d 654, 657 n.2 (1st Cir. 1978).

Under these circumstances, this effort to relitigate the tribe's claim is barred by elementary principles of res judicata. *See Restatement (Second) of Judgments* §§ 19, 24-25, 41 (1982); 3 Bracton, *On the Laws and Customs of England* 351-52 (S. Thorne trans. 1977) (circa 1250). The addition of other defendants and parcels of land does not change the result, for title to all Mashpee land is what was, and what remains, at stake. *See Mendez* v. *Bowie*, 118 F.2d 435, 440 (1st Cir.), *cert. denied sub nom. Rios* v. *Bowie*, 314 U.S. 639 (1941); *Mertes* v. *Mertes*, 350 F. Supp. 472 (D. Del. 1972), *aff'd by order*, 411 U.S. 961 (1973); *Restatement (Second) of Judgments* §§ 25, 43 comment c (1982). Indian land claims are not entitled to a special exemption from these principles. *See Arizona* v. *California*, 51 U.S.L.W. 4325, 4331 (U.S. Mar. 30, 1983) (dictum); *Heckman* v. *United States*, 224 U.S. 413, 445-46 (1912). Our examination of the trial record confirms our previous conclusion that the trial court was not biased; we deny the plaintiffs' second motion to disqualify the trial judge, as well as all remaining motions.

The judgment of the district court is affirmed. The petition for mandamus and all other motions are denied.

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No. 82-2146

In the Supreme Court of the United States

OCTOBER TERM, 1982

MASHPEE TRIBE
PETITIONER

v.

NEW SEABURY CORP., ET AL.
RESPONDENTS

Reply Brief for Petitioner

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Table of Contents

Introduction	1
Argument	2
Conclusion	7

Table of Authorities

CASES

Cayuga Indian Nation v. Cuomo, 565 F.Supp. 1297 (N.D.N.Y. 1983)	2, 6
City of Saulte Ste. Marie v. Andrus, 532 F.Supp. 157 (D.D.C. 1980)	3
Mashpee Tribe v. Town of Mashpee, 447 F.Supp. 940 (D.Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979)	*Passim*
Mashpee Tribe v. Watt, 542 F.Supp. 797 (D.Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir. 1983)	1, 6
Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974)	2
Oneida Indian Nation v. New York, 691 F.2d 1070 (2nd Cir. 1982)	2, 5
Tully v. United States, 32 Ct.Cl. 1 (1896)	2
United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866)	2, 4
United States v. Joseph, 94 U.S. 614 (1876)	4, 5
United States v. Sandoval, 231 U.S. 28 (1913)	5, 6
Wilbur v. United States, 281 U.S. 206 (1930)	2, 4

STATUTE

25 U.S.C. § 177 6

RULE

Supreme Court Rule 17 2

REGULATION

44 Fed. Reg. 7234-37 (February 6, 1979) 3

OTHER AUTHORITIES

Clinton & Hotopp, Judicial Enforcement Of The Federal Restraints On Alienation Of Indian Land: The Origins Of The Eastern Land Claims, 31 Me.L.Rev. 17 (1979) 3

Mashpee Revisited, American Indian Journal, November 1980 3

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Reply Brief for Petitioner

Introduction

Respondents' briefs in opposition contend that petitioner's case does not present substantial questions; that the Mashpee Tribe is neither federally recognized nor on the current list of federal Indian tribes; that there were no exceptional circumstances warranting recall of mandate by the Court of Appeals; that petitioner's motion to recall mandate and vacate judgment was untimely; and that a second action, *Mashpee Tribe v. Watt*, 542 F.Supp. 797 (D.Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir. 1983) (*Mashpee II*) seeking the "same land" from the "same defendants" based on the "same legal theories" was recently dismissed. Petitioner will briefly discuss each of these arguments.

Argument

Respondent Town's contention that petitioner does not meet the considerations set forth in Sup.Ct.R. 17 is frivolous.

First and foremost, as petitioner clearly shows in instant petition, the First Circuit's order that petitioner's motion to vacate and substitute judgment be returned without filing or hearing, so far departs from "the accepted and usual course of judicial proceedings ... as to call for exercise of this Court's power of supervision." Sup.Ct.R. 17.1(a).

Second, the Court of Appeals, by allowing *Mashpee Tribe v. Town of Mashpee*, 447 F.Supp. 940 (D.Mass. 1978), *aff'd sub nom., Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (*Mashpee I*) to stand in light of petitioner's submission, in effect conflicts with *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866) (recognition of tribe by political departments of federal government binds the courts), and with *Wilbur v. United States*, 281 U.S. 206, 221 (1930) (whether tribe is still existing is question of law for court). *See* Sup.Ct.R. 17.1(c).

Third, the "non-decision" by the First Circuit results in the anomaly that Indian tribes on the same federal lists as the Mashpees (Pet.App. B) are having their claims heard in the Second Circuit without any question of tribal existence. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Oneida Indian Nation v. New York*, 691 F.2d 1070 (2nd Cir. 1982); *Cayuga Indian Nation v. Cuomo*, 565 F.Supp. 1297 (N.D.N.Y. 1983). *See* Sup.Ct.R. 17.1(a).

And fourth, the First Circuit's refusal to hear petitioner ignores Court of Claims precedent. *Tully v. United States*, 32 Ct.Cl. 1, 7-8 (1896) (recognition of tribe by executive officers accepted by courts).

Respondent Town also argues that petitioner is neither federally recognized nor included on the current listing of federal Indian tribes (Town Opp.Br. 7 n. 1), and that "sev-

eral of the documents appended to the petition as 'Appendix B' were introduced into evidence during the *Mashpee I* trial." *Id.* at 10.

To begin with, the federal documents included in "Appendix B" to instant petition show petitioner was officially listed by the Bureau of Indian Affairs (BIA) and its predecessors as an Indian tribe of the United States. And as the federal government recently admitted, neither petitioner nor its Reservation have ever been federally terminated (Pet.App. B). Thus, petitioner has every right to be on the current BIA list.[1]

Such a situation, however, is not without precedent. In *City of Saulte Ste. Marie v. Andrus*, 532 F.Supp. 157 (D.D.C. 1980), it was pointed out that because of "earlier [BIA] errors and omissions" the Chippewa Tribe, which should have been federally recognized in 1934, was overlooked. But the court, after discussing Chippewa history including federal recognition during the 1800s, held the Secretary of the Interior acted properly when in 1972 he subsequently recognized the Chippewas.

In short, the current official BIA list is not etched in stone and petitioner believes the Mashpees' present predicament is akin to the Chippewas' in *City of Saulte Ste. Marie v. Andrus*.

Respondent's contention that some of the federal documents (which it does not identify) were submitted to the *Mashpee I jury* along with *over 600* other exhibits, misses petitioner's point. *A jury had no place* in *Mashpee I*.[2] *Tribal existence is a question of law only for a judge* to determine,

---

[1] Most of the tribes listed along with the Mashpees on the older lists are included on the current BIA list. *Compare* Pet.App. B. with 44 Fed. Reg. 7234-37 (February 6, 1979).

[2] The entire *Mashpee I* procedure has been seriously questioned in *Mashpee Revisited*, American Indian Journal, November 1980, p. 19, and in Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints On Alienation Of Indian Land: The Origins Of The Eastern Land Claims*, 31 Me.L.Rev. 17 (1979). During the *Mashpee I* trial, the District Judge told the jury: "(A)s you perhaps gathered,

Wilbur v. United States, *supra*, and the federal political recognition binds the courts. *United States v. Holliday*, *supra*. Thus, a federal judge should have examined the federal and state documents[3] as the basis for his decision. But not only the *Mashpee I* District and Circuit Court opinions *did not mention any* of the federal or state documents in 1978 and 1979, those same courts in 1982 and 1983 refused even to acknowledge these documents, let alone address any of petitioner's arguments concerning those documents in their motion to vacate and substitute judgment.

Respondents further argue there are no "exceptional circumstances" warranting recall of mandate, (Town Opp.Br. 8-10), and the motion to vacate and substitute judgment was not timely filed (Atty.Gen. Opp.Br. 7).

Petitioner contends that under the unique circumstances of this case, respondents' arguments again are frivolous.

In *United States v. Joseph*, 94 U.S. 614 (1876), this Court, noting that the prior sovereign, Mexico, had made the Pueblo Indians of New Mexico citizens and had granted the Indians their lands in fee simple, held the Pueblos did not constitute Indian tribes under federal guardianship and their lands were not subject to federal alienation restriction.

'tribe' is a fluid word having many different meanings to many different people; and ultimately, you'll have to work with a definition that I will have to give you, a prospect I look forward to with some intrepidation [sic]." (*Mashpee I* Tr. 26-72, 23 November 1977). Both during and after the trial, the parties and the District Judge questioned the relevance of all the purported "relevant times" submitted to and passed on by the jury *except 1976*. *See Mashpee I*, 447 F.Supp. at 947-948. And in upholding the lower court, the First Circuit applied the rule that a jury verdict will be upheld if there is any view of the evidence supporting it. *Mashpee I*, 592 F.2d at 590. Application of this standard led to some pretty far-reaching speculation and surmise. And if there never should have been a jury, most of the *Mashpee I* appellate opinion is surplusage anyway because most of the opinion is devoted to trying to justify what the jury said and did.

[3] Under the circumstances of this litigation, the numerous official State reports and maps recognizing petitioner and its reservation (*see, e.g.*, Pet.App. C) are admissions against interest.

But almost *four decades later*, *United States v. Sandoval*, 231 U.S. 28 (1913) overruled *Joseph* because statements by the territorial court there relied on "are at variance with other recognized sources of information, now available." 231 U.S. at 49. *Sandoval* held the Pueblos *were* federal Indian tribes and their lands *were* subject to federal alienation restriction.

Instant petitioner now, is in much the same position as the Pueblos were after *Joseph*.

Because of respondents' uncontested jury demand (Pet. 5), and because crucial federal and state documentation establishing petitioner's status as a matter of law was never considered by a federal judge, petitioner believes their tribe and their lands have been denied the federal protection they are entitled to as a matter of law.

If in *Sandoval*, this Court was willing to consider "other recognized sources of information" not brought to its attention in *Joseph* and overrule after a forty year lapse, there was absolutely no reason the First Circuit should not have done the same in instant petitioner's case after only a four year lapse. In fact, the *Joseph* Court likened the Pueblos' condition to that of northeastern Indians such as the Senecas and Oneidas of New York. 94 U.S. at 617. Just as the Pueblos were under Mexico's guardianship and held their lands subject to sovereign alienation restriction before entering the Union, so the New York and Massachusetts tribes were under first Crown then State guardianship with sovereign alienation restriction on their lands when the United States Constitution became operable on March 4, 1789.[4] So if the Pueblos are federally protected, instant petitioner is also entitled to federal protection:

[4] The extent of State power over Indian affairs even during the Confederation period has been questioned. *See Oneida Indian Nation v. New York*, *supra*, 691 F.2d 1070. However, this case does not raise the issue of pre-1789 State action.

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over *all dependent Indian communities* within its borders, whether *within its original territory* or territory subsequently acquired, and whether within or without the limits of a State.

United States v. Sandoval, 231 U.S. at 45-46 (emphasis added).

Accordingly, petitioner does not believe this Court should allow the First Circuit to doom the Mashpees to oblivion simply because of procedural aberration and questionable representation in the trial court.

Finally, respondent Town misrepresents *Mashpee II* as involving the "same land", "same defendants" and "same legal theories" (Town Opp.Br. 11). Inasmuch as *Mashpee II* will be the subject of a separate petition for certiorari, instant petitioner's discussion will be brief.

First, significantly more land is claimed in *Mashpee II*. Second, while *Mashpee I* named only a class of private defendants, *Mashpee II* includes federal and state defendants (*i.e.*, James G. Watt, Commonwealth of Massachusetts). Third, while the *Mashpee I* plaintiff based its claim solely on the Nonintercourse Act (25 U.S.C. § 177), the *Mashpee II* plaintiffs base their claims primarily on the federal Indian common law as an incident of federal sovereignty and as incorporated in the commerce and treaty clauses of the United States Constitution. *See Cayuga Indian Nation v. Cuomo*, *supra*, 565 F.Supp. at 1317-1320. And while respondents harp on "finality" in litigation, *Mashpee I* was dismissed at the "threshold" for lack of "standing" and therefore was not a final judgment on the merits. *See Mashpee I*, 592 F.2d at 579, 581, 589. So clearly the Mashpees have the greater equity.

Conclusion

For all the reasons stated above and in the petition, a writ of certiorari should issue to review the order of the Court of Appeals.

Respectfully submitted,

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